No. 02-29

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

—v.—

FREDY ORLANDO VENTURA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent Fredy Orlando Ventura, through counsel, hereby opposes the Immigration and Naturalization Service's ("INS") petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit, far from engaging in a "recurring error" or creating a split with other circuits, did no more than apply well-settled principles of administrative law —principles that this Court, the Ninth Circuit, and other courts of appeals routinely apply—in determining that remand to the Board of Immigration Appeals ("BIA") on the issue of changed country conditions would be a futile and wasteful exercise. The court reached that conclusion because the administrative record lent itself to only one reasonable outcome—a finding that INS had not carried its burden of rebutting the presumption of a well-founded fear of future persecution with specific evidence of changed country conditions. Based on that specific record, the court reasonably concluded that remand to the BIA was unwarranted.

That ruling applied the correct legal standard and is consistent with this Court's jurisprudence and with rulings by other courts of appeals. The Ninth Circuit, like other circuits and like this Court, applies the traditional principle of administrative law that where an administrative agency has not passed on a particular issue, a federal court presumptively should defer (whether by remand or other means) and allow the administrative agency an opportunity to pass on the issue in the first instance, subject to judicial review under the appropriate standard of review. This principle has been variously termed "separation of powers," "primary jurisdiction," and "exhaustion of remedies."

Moreover, like other courts of appeals, the Ninth Circuit's presumption of deference for initial consideration by the administrative agency is exactly that—a presumption—and not an absolute and rigid rule. Like most presumptions, the presumption is rebuttable and does not compel deference where, on balance, deference would be an empty exercise and a waste of judicial and litigant resources. Where it is clear that the agency could come to only one sustainable conclusion, the Ninth Circuit, like other courts, has declined to engage in the empty ritual of allowing the agency the "first crack" at the issue and has instead decided the issue itself. There is nothing extraordinary or erroneous about such a common-sense balancing of the benefits of deferring to an administrative agency against the costs of doing so.

Because the Ninth Circuit, in this case, was applying the same flexible doctrine of administrative law that other courts of appeals and this Court have applied in analyzing the rebuttable presumption of deference, no circuit split exists. Indeed, in situations essentially identical to the present case, the Ninth Circuit has granted asylumseekers' petitions for review, held that asylumseekers were presumptively entitled to asylum, and then *remanded* to the BIA for an initial assessment of changed country conditions—in other words, precisely the result for which INS is advocating.

Thus, the Ninth Circuit applies the correct principle of administrative law to asylum cases and often finds that remand is appropriate. In substance, then, INS's disagreement with the Ninth Circuit's ruling in this particular case is not that the court applied the wrong legal principle or that the court is out of step with its sister circuits, but rather that INS is not in agreement with the application of the undisputed legal principle to the facts of this specific case and this specific administrative record. INS prefers that the panel in this case would

have reached the same conclusion that other Ninth Circuit panels have reached in similar asylum cases, namely, that remand to the BIA was appropriate. Yet, disagreement with one panel decision's application of an undisputed legal principle to a particular factual pattern is not worthy of this Court's scarce certiorari jurisdiction, and the Court thus should deny the petition.

STATEMENT

Respondent fled Guatemala in 1993 after receiving several threats from the Guatemalan guerrillas that he join them or be killed. Respondent feared the guerrillas in light of his family's close association with the Guatemalan military and past violence by the guerrillas against his family and a friend. App. at 20a-21a.[1]

Respondent's affiliation with the military is not tangential in nature. Respondent had a close relationship with his cousin, who was a lieutenant in the Guatemalan army. Respondent described their relationship as akin to brothers. Respondent's cousin would visit Respondent's home during his monthly leave from the military and would sleep there. In addition, Respondent's uncle was a military commissioner for many years. As a military commissioner, he was responsible for recruiting young Guatemalan men to join the army. Respondent's uncle was attacked by the guerrillas with a machete and almost killed. Another of Respondent's cousins was also in the military and was killed by the guerrillas. *Id.*; A.R. at 77.

In 1992 and 1993, shortly before his flight from Guatemala, Respondent received three written threats from the guerrillas. Each threat indicated that Respondent and/or his family would be harmed if Respondent

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[1] Cites to "App." are to the appendix to the petition for certiorari. Cites to "Opp. App." are to the appendix to this opposition.

did not join the guerrillas. Respondent believed that he had been targeted because of his family's military affiliation and because the guerrillas were well aware of Respondent's close relationship with the military members of his family. In 1993, the guerrillas targeted one of Respondent's close friends. After receiving several threats, the friend was shot and killed. Next to the friend's body was a note that stated "because you didn't obey." App. at 20a-21a; A.R. at 71-79.

After receiving the guerrillas' third threat and after his friend's murder, Respondent fled Guatemala, made his way to the United States, and affirmatively sought asylum. App. at 20a-21a; A.R. at 71.

As described in Petitioner's Statement, the Immigration Judge denied Respondent's asylum request, and the Board of Immigration Appeals ("BIA") affirmed. App. at 14a-23a. The BIA concluded that Respondent had not established a causal link between his imputed political view (i.e., sympathy for the military) and the threats. The BIA thus held that Respondent had not established his presumptive eligibility for asylum. Because of that determination, the BIA did not reach the issue of whether conditions in Guatemala had changed sufficiently to rebut any presumption that Respondent had a well-founded fear of future persecution. The primary evidence in the record relating to country conditions consisted of a 1997 State Department country report that indicated that, although the situation in Guatemala was improving, guerrilla violence still existed. A.R. at 87-98.

After the BIA decided in INS's favor, Respondent petitioned the Ninth Circuit for review. *See Ventura v. INS*, 264 F.3d 1150 (9th Cir. 2001); App. at 1a-13a. The Ninth Circuit reversed the BIA's determination and held that Respondent had established his presumptive eligibility for asylum and his eligibility for withholding of deportation. App. at 10a-13a. The court noted that the BIA had not reached the issue of country conditions in Guatemala and that, in such a circumstance, "we generally will remand to the BIA for it to consider the issue." App. at 11a. The court went on to state that "[w]e do not remand, however, when it is clear that we would be compelled to reverse the BIA's decision if the BIA decided the matter against the applicant." *Id.* The court concluded that, based on the administrative record before it, the latter rule applied and avoided the need for a remand. App. at 11a-13a.

While Respondent's asylum case was working its way through the administrative and judicial process, Respondent filed a motion with the BIA to reopen his asylum case to introduce new evidence impacting his claim.[2] Opp. App. at 1a-21a. After Respondent's flight from Guatemala and after his hearing before the Immigration Judge, his family was repeatedly targeted with threats and violence. First, two of Respondent's brothers were brutally murdered in Respondent's hometown. Second, shots were fired at Respondent's parents' home, and his parents received a note stating "We already started with your family and we will finish with you if you don't leave this place." His family fled as a result. After their flight, shots have continued to be fired at their home. *Id.*

The BIA denied the motion to reopen, Opp. App. at 18a-21a, and Respondent sought review in the Ninth Cir-

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[2] Attached as an appendix to this opposition is Respondent's motion to recall the mandate in Ninth Circuit case number 99-71004. That motion describes the procedural history of Respondent's motion to reopen and describes the new evidence supporting Respondent's claim. Respondent is not attaching the exhibits to the motion, given that they are somewhat voluminous. Respondent requests that the Court take judicial notice of the file in Ninth Circuit case number 99-71004. Respondent will provide additional materials about that related case upon request.

cuit (case no. 99-71004). Respondent's former counsel, however, failed to pay a required filing fee, and the Ninth Circuit dismissed the appeal for failure to prosecute. Upon substitution of new counsel, Respondent moved to recall the Ninth Circuit's mandate and to reinstate his petition for review relating to the new evidence. Opp. App. at 1a-17a. The Ninth Circuit, however, did not rule on the motion and instead granted Respondent's petition for review based solely on the original record. The motion to recall the mandate is still pending before the Ninth Circuit.

REASONS FOR DENYING THE PETITION

This Court long ago crafted the relevant legal principle governing the issue of when a court should defer to an administrative agency for initial determination of an issue and when the court need not defer. The Court created a presumption of deference that can be rebutted by balancing the benefits and costs of deference—in other words, by determining if deference to the agency for initial consideration of an issue is really worth it. The Ninth Circuit and other circuits have applied that well-settled rule on many occasions and, depending on the facts before them, have at times deferred and at times not deferred. The panel decision in this case applied the same exact principle and, based on the facts before it, concluded that remand would not be appropriate in light of the administrative record in this case. That application of law to fact by one panel does not warrant a grant of certiorari.

The Court's Creation Of The Rebuttable Presumption Of Initial Agency Determination Of Issues Within An Agency's Jurisdiction

The Court has held that, as a general matter, administrative agencies, and not courts, should have the first opportunity to pass on issues relating to the laws and regulations that are within the agencies' ambit of responsibility. Once an agency has addressed the issue, a federal court may review the agency's decision under the appropriate standard of review. Whether referred to as "primary jurisdiction," "exhaustion of remedies," or "separation of powers," the doctrine is "concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63-64 (1956); *see Reiter v. Cooper*, 507 U.S. 258, 269 (1993) (distinguishing between primary jurisdiction and exhaustion of remedies).

"No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *W. Pac. R.R. Co.*, 352 U.S. at 64. Consistent with that principle of flexibility in the relationship between judiciary and administrative agencies, the Court has held that where a court reviews an agency decision and where the agency did not consider a particular issue that the court believes to be of importance, the presumptive course is to remand to the agency for an initial determination. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). However, the *Lorion* Court did not make that rule of remand an inflexible and invariable one and instead made provision for a rebuttal of the presumption under exceptional circumstances. *See id.* at 744 (indicating that

remand was "generally" necessary but that it could be avoided in "rare circumstances"); *see also Reiter*, 507 U.S. at 269 (noting that initial determination by administrative agency was "ordinarily" the appropriate course); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) (noting that remand to agency was "preferred course"); *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) (stating that although remand to administrative agency was generally the appropriate course when a court determined that the agency had committed error, "[t]here doubtless may be situations where . . . remand [is] inappropriate"); *cf. Coit Independence Joint Venture v. Fed. Sav. and Loan Ins. Corp.*, 489 U.S. 561, 579-87 (1989) (holding that exhaustion of remedies was unnecessary where it would cause unreasonable delay).

Accordingly, the general rule, as fashioned by this Court, is that a federal court should permit an administrative agency to have the first opportunity to consider an issue within the agency's jurisdiction and that the Court presumptively should not adjudicate the issue in the first instance. However, at no point has this Court held or even intimated that that rule is an inflexible one. Instead, "the question is . . . whether the purposes [the doctrine] serves will be aided by its application in the particular litigation." *W. Pac. R.R. Co.*, 352 U.S. at 64. In other words, the presumption can be rebutted if the benefits of allowing initial decision by an agency are outweighed by the costs of doing so.

Other Circuits' Application Of The Rebuttable Presumption Of Initial Agency Determination

The lower courts have applied the rule of a presumptive, but not automatic, preference for initial agency determination of issues within agency jurisdiction. As the Fifth Circuit has stated:

> A court considering deferring to an agency's primary jurisdiction must weigh the benefits of obtaining the agency's aid against the need to resolve the litigation expeditiously and may defer only if the benefits of agency review exceed the costs imposed on the parties.

Wagner & Brown v. ANR Pipeline Co., 837 F.2d 199, 201 (5th Cir. 1988); *see also PHC, Inc. v. Pioneer Healthcare*, 75 F.3d 75, 80 (1st Cir. 1996); *Nat'l Communications Ass'n, Inc. v. AT&T Co.*, 46 F.3d 220, 223 (2d Cir. 1995) ("The court must also balance the advantages of applying the doctrine against the potential costs resulting from complications and delay in the administrative proceedings."); *Gulf State Utils. Co. v. Ala. Power Co.*, 824 F.2d 1465, 1473 ("We have said that a district court in its discretion should invoke primary jurisdiction and defer only if the benefits of obtaining the agency's aid outweigh the need to resolve the litigation expeditiously."), *opinion amended by* 831 F.2d 557 (5th Cir. 1987).

Courts have been particularly sensitive to the delay that may result from permitting an agency to evaluate the issue in the first instance. *See Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 60 (2d Cir. 1994); *United States v. McDonnell Douglas Corp.*, 751 F.2d 220, 224 (8th Cir. 1984) ("A court 'should be reluctant to invoke the doctrine of primary jurisdiction, which often, but not always, results in added expense and delay to the litigants where the nature of the action deems the application of the doctrine inappropriate.' ") (citations and quotations omitted). And, courts have expressed a reluctance to invoke the doctrine where initial agency consideration will not provide meaningful assistance to judicial consideration of the issue. *See, e.g., Am. Auto. Mfrs. Ass'n v. Mass. Dep't of Envtl. Prot.*, 163 F.3d 74, 81 (1st Cir. 1998). Thus, where the issue under consid-

eration is straightforward in nature or the resolution clear, the presumption is rebutted. *See Nat'l Communications Ass'n, Inc.*, 46 F.3d at 223.

Courts' application of the presumption and the rebuttal of the presumption extends to the remand context as well, and courts have not remanded for initial agency proceedings where to do so would be inefficient, unnecessary, or otherwise inappropriate. *See Cent. S.D. Coop. Grazing Dist. v. Sec'y of the U.S. Dept. of Agric.*, 266 F.3d 889, 895 n.8 (8th Cir. 2001); *Sierra Club v. Peterson*, 185 F.3d 349, 369-70 (5th Cir. 1999), *cert. denied sub nom. Texas Comm. on Natural Res. v. Veneman*, 532 U.S. 1051 (2001). As one court has explained in declining to remand to an agency for initial determination of an issue:

> Existence of primary authority or primary jurisdiction of an agency does not, however, require remand if the outcome is sufficiently clear. In 1993 Fed. R. Civ. P. 1, calling on courts to seek the "just, speedy and inexpensive" determination of every action, was amended to provide that all procedural rules should be "administered" as well as "construed" to that end. Remanding for clarification of the administrative decision where the outcome is foregone would add to expense and delay with no benefit to the administration of justice, and thus run counter to this authoritative and recent pronouncement.

Thompson v. Shalala, 868 F. Supp. 621, 624-25 (S.D.N.Y. 1994) (citations omitted).

Accordingly, the Ninth Circuit is not alone in its application of the rule of reason when it assesses whether to remand to an administrative agency. Other circuits, as well, balance the benefits of deference

against the costs of deference and then determine whether the presumption of deference has been rebutted.

The Ninth Circuit's Application Of The Rebuttable Presumption Of Initial Agency Determination

The Ninth Circuit's application of the rule is consistent with the application by other courts. The court has stated that "[t]he purpose of the primary jurisdiction doctrine is . . . to secure a place for administrative power within our legal system . . . ." *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1365 (9th Cir. 1987). In evaluating whether to defer, the Ninth Circuit, like other courts, considers the benefits and costs of deference. *See Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1051 (9th Cir. 2000); *Cal-Almond, Inc. v. Dep't of Agric.*, 67 F.3d 874, 881-82 (9th Cir. 1995), *vacated by*, 521 U.S. 1113 (1997).

The Ninth Circuit also has applied the presumption of deference and remand in the asylum context. The court frequently has encountered the scenario at issue in this petition for certiorari—whether to remand for consideration of changed country conditions after holding that the BIA has erred in finding that the asylumseeker did not experience persecution on account of a relevant view or status. When faced with this issue, the Ninth Circuit has evaluated the administrative record before it and, in light of the principles described above, has made a determination of whether remand would be appropriate.

In a number of those asylum cases, the Ninth Circuit has done precisely what INS is advocating here—it has remanded to the BIA for initial consideration of the country-conditions issue. In *Shoafera v. INS*, 228 F.3d 1070 (9th Cir. 2000), the court reversed the BIA's determination that the asylumseeker had not been persecuted

on account of her ethnicity. The court then remanded to the BIA for assessment of country conditions and described the Ninth Circuit's approach to the remand determination: "Remand is not necessary in all cases similar to the present one. We remand in the present case because it is unclear whether the country conditions in the record serve to rebut the presumption." *Id.* at 1076 n.5 (citations omitted); *see also Gafoor v. INS*, 231 F.3d 645, 655 (9th Cir. 2000) ("We therefore remand to the BIA to consider whether recent events in Fiji undermine the finding that Gafoor's well-founded fear of persecution is rebutted by changed country conditions."); *Del Carmen Molina v. INS*, 170 F.3d 1247, 1250 (9th Cir. 1999) ("[T]he BIA did not analyze the facts to assess whether the INS had rebutted the presumption by showing the effect of changed country conditions. Therefore, we remand to the BIA to determine whether sufficient evidence of changed country conditions exists to rebut the presumption of a well-founded fear of persecution."); *Singh v. INS*, 94 F.3d 1353, 1361 (9th Cir. 1996) ("Given the record before us and because the BIA never applied the regulatory presumptions, we think it appropriate to remand this case."); *Osorio v. INS*, 99 F.3d 928, 932-33 (9th Cir. 1996).[3]

INS, in its petition for certiorari, is correct in noting that, in some cases, the Ninth Circuit has held that remand for consideration of country conditions is inappropriate because the record is sufficiently clear on the issue that only one resolution of the issue is possible. In

[3] The Ninth Circuit has remanded to the BIA for initial evaluation of country conditions in several unpublished decisions as well. *See Hernandez-Patzon v. INS*, No. 98-70451, 1999 WL 282489, at *2 (9th Cir. Apr. 15, 1999); *Ramos-Calmo v. INS*, No. 98-70176, 1999 WL 459582, at *3-*4 (9th Cir. July 2, 1999); *Avila-Enriquez v. INS*, No. 98-70603, 1999 WL 542883, at *1 (9th Cir. July 26, 1999); *Lina v. INS*, No. 97-70500, 1999 WL 486351, at *1 (9th Cir. July 8, 1999).

that situation, the Ninth Circuit—consistent with the rebuttable presumption of deference—does not remand. Instead, it decides the issue and thereby allows the parties and the judicial system to conserve scarce resources that would be consumed by a pro forma remand.

Contrary to INS's suggestion in its petition for certiorari, the Ninth Circuit's country-conditions remand jurisprudence is not monolithic in refusing to remand. Indeed, the court has remanded to the BIA on numerous occasions. But, whether it chooses to remand or not to remand, the Ninth Circuit has simply applied the well-settled principles of administrative law that are described above. The court has balanced the benefits of remand against the costs of remand and, on a case-by-case basis, has made a determination of where the balance lies. There is nothing erroneous in that state of affairs, and no circuit split exists.

The Panel's Application Of The Rebuttable Presumption To The Facts Of This Case

The panel decision at issue here falls squarely within the general, but rebuttable, rule of deference and remand described above. The court determined that Respondent was presumptively entitled to asylum—INS does not challenge that ruling in its petition for certiorari—and then engaged in an analysis of whether remand to the BIA for assessment of country conditions would be appropriate.

That analysis led the court to conclude that remand was inappropriate in that the administrative record in the case reasonably supported one conclusion only: that country conditions had not changed sufficiently to rebut the presumption of asylum eligibility. The court focused on INS's evidence on this issue—a 1997 State Department report on Guatemala. The report indicated that,

although guerrilla violence in Guatemala had diminished, the guerrillas still targeted civilians. In light of the fact that the evidence in the record did not support a finding that INS had rebutted the presumption of eligibility for asylum, the court held, correctly, that remand was not the appropriate course. In other words, the costs of remand (in delay, in consumption of judicial and litigant resources) outweighed the "benefits" of remand (an empty gesture of deference to the BIA). The court's determination not to engage in that empty and wasteful gesture was in accord with established principles of administrative law.

The Ninth Circuit's determination not to remand makes particular sense in light of the BIA's decision not to reopen Respondent's asylum case to permit introduction of recent evidence of persecution of his family. In its petition for certiorari in *INS v. Chen*, No. 02-25, INS takes the position that a significant benefit of remand for consideration of country conditions is the ability of the BIA to reopen the record to "refresh or supplement" the administrative record for full consideration of country conditions. *See* Petition for Certiorari in *INS v. Chen*, No. 02-25 (filed July 3, 2002) at 24. According to INS: "That reopening of the record would perhaps lead to a different result than the one that the court of appeals would find compelled by the initial, less complete record." *Id.* Here, however, the BIA explicitly decided *not* to reopen the case to permit additional evidence supporting Respondent's claim. Opp. App. at 18a-21a. Given that decision, there is no reason to think that the BIA would reopen the case to augment the administrative record with up-to-date evidence of country conditions. Indeed, it would be highly inequitable to permit the BIA to allow new evidence that is unfavorable to Respondent while barring Respondent from introducing

new evidence that provides significant support for his claim.

* * *

INS no doubt disagrees with the Ninth Circuit's application of law to fact in this case. INS surely can and will articulate reasons why the State Department report did, indeed, provide a factual basis for the BIA to come to a different conclusion than the court. But, that factual dispute is not a basis for certiorari. This Court is not a court of errors. Its certiorari jurisdiction is reserved for significant issues of public concern and for issues whose treatment by the lower courts lacks consistency. Given that the Ninth Circuit has applied an undisputed general principle of administrative law and has often come to the precise conclusion for which INS advocates, INS is asking the Court to grant certiorari to correct a factual error alleged to have occurred in this case and in a few others. That is not a compelling basis for a grant of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 2, 2002

APPENDIX

No. 00-70328
(Related To No. 99-71004,
Which Is Set For Oral Argument On June 13, 2001)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FREDY ORLANDO VENTURA,
INS No. A72-688-860,
Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

MOTION TO RECALL MANDATE, TO
REINSTATE PETITION FOR REVIEW, AND
TO CONSOLIDATE WITH CASE NO. 99-71004

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I. INTRODUCTION

Petitioner Fredy Orlando Ventura has petitioned for review of the Board of Immigration Appeals' ("BIA") denial of his asylum claim. This Court will hear oral argument on that petition (case number 99-71004) on June 13, 2001. While that petition was pending in this Court, Petitioner moved to reopen his asylum proceeding based on significant new evidence supporting his claim that Guatemalan guerrillas had threatened to kill him on account of his imputed political opinion and affiliation with the Guatemalan military. The BIA denied Petitioner's motion to reopen, and Petitioner filed a timely petition for review in this Court on March 24, 2000.

On February 14, 2001, the Court dismissed the petition for review of the BIA's denial of the motion to reopen, because Petitioner and his then-counsel had not paid the required filing fee. In dismissing the petition, the Court issued its mandate.

Petitioner, who now has new appellate counsel, requests that the Court recall its mandate, reinstate the petition for review (in conjunction with this motion, Petitioner is submitting his filing fee), and consolidate the petition with the petition for review of the denial of Petitioner's asylum claim.[1] The new evidence—the brutal murders of two of Petitioner's brothers, death threats against Petitioner's family, and repeated gunfire directed at Petitioner's family's home—provides substantial support for Petitioner's claim that the guerrillas' threats against him were credible and on account of his family's affiliation with the military. The new evidence is also significant in that these new acts of violence undermine the government's claim that conditions have changed in Guatemala

[1] Counsel for Petitioner informed Respondent Immigration and Naturalization Service of his intent to file this motion. INS has not indicated whether it will oppose the motion.

such that Petitioner does not have a well-founded fear of persecution.

In light of the significance of the new evidence, because the petition for review itself was timely, and because Petitioner's default resulted from his prior attorney's failure to ensure that the filing fee was paid, the Court can and should exercise its discretion to recall its mandate and reinstate the petition so that Petitioner's complete asylum claim can be heard and adjudicated on the merits.

II. BACKGROUND

A full account of Petitioner's asylum claim is contained in the brief in support of his petition for review in case number 99-71004, a true and correct copy of which is attached to this motion as Exhibit A; a true and correct copy of the government's brief in case number 99-71004 is attached to this motion as Exhibit B.[2] Petitioner will not provide a full recitation in this motion of the facts giving rise to his asylum claim. Instead, Petitioner will provide a brief description and will focus on the facts relevant here.

Petitioner is seeking political asylum in the United States based on death threats that he received from the Guatemalan guerrillas on account of his family's affiliation with the Guatemalan military and the political views that the guerrillas therefore imputed to Petitioner. The guerrillas threatened to kill Petitioner if he did not join their rebellion. One of Petitioner's friends was killed for not joining the rebellion. *See* Exhibit A at 7-9.

[2] Petitioner requests, pursuant to Federal Rule of Evidence 201, that the Court take judicial notice of Exhibits A through E, which are all part of the case file in Case No. 99-71004 or the case file for this petition for review. *See United States v. Doss*, 563 F.2d 265, 269 n.2 (6th Cir. 1977) (and cases cited therein).

Petitioner, represented by counsel, sought asylum in the United States. An immigration judge found Petitioner's testimony credible but nevertheless denied his claim based on the court's conclusion that the guerrillas' persecution of Petitioner was not "on account of" his political views or social affiliation. *See* Certified Administrative Record in Case No. 00-70328 ("Record") at 55-62. The Board of Immigration Appeals affirmed that determination, *see* Record at 30-31, and Petitioner sought review in this Court (a true and correct copy of the petition for review *is* attached to this motion as Exhibit C). The briefing in that appeal has been completed, and the matter is set for oral argument on June 13, 2001.

On August 26, 1999, while his petition for review was pending in this Court, Petitioner moved to reopen his asylum claim in the BIA. The basis for the motion was the occurrence, after Petitioner's asylum hearing, of several events that lend support to Petitioner's belief that if he returns to Guatemala, he will be targeted and killed. First, two of Petitioner's brothers (one of whom was in the military) were brutally murdered in Petitioner's home town. Second, shots were fired at Petitioner's parents' home, and Petitioner's parents received a note stating "We already started with your family and we will finish with you if you don't leave this place." Petitioner's family fled their town as a result of the incidents. After their flight, shots have continued to be fired at their home. *See* Record at 7-14, 19-27.

On February 24, 2000, the BIA denied the motion to reopen on the rationale that the new evidence would not have changed the result in the case. *See* Record at 2-3. On March 24, 2000, Petitioner filed a timely petition for review in this Court (a true and correct copy of which is attached to this motion as Exhibit D), and on December 13, 2000, the Court ordered Petitioner to pay the

required filing fee. On February 14, 2001, the Court dismissed the petition for failure to pay the fee, pursuant to Ninth Circuit Local Rule 42-1, and issued its mandate. *See* Exhibit E (a true and correct copy of which is attached to this motion).[3]

On May 10, 2001, Heller Ehrman White & McAuliffe LLP substituted in as counsel for Petitioner in connection with the appeal of the denial of asylum. Simultaneously with this motion, Heller Ehrman is also substituting in as counsel in connection with the dismissed petition for review of the BIA's denial of the motion to reopen. Petitioner has proffered the appropriate filing fee. Moreover, Petitioner is submitting a declaration (Exhibit F attached to this motion) stating that he wished to pursue his petition for review of the BIA's denial of the motion to reopen, that he did not ask his former attorney to refrain from paying the filing fee or otherwise prosecuting the petition, and that he did not consent to his former attorney's actions in failing to prosecute the petition. Petitioner further states in his declaration that he was never informed of the need to pay a filing fee and that had he been made aware of the requirement, he would have paid the fee.

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[3] The clerk's dismissal of the petition was not mandatory. *See Larez v. City of Los Angeles*, 946 F.2d 630, 637 (9th Cir. 1991) (refusing to dismiss appeal for violation of rules relating to briefing); *Walker v. Mathews*, 546 F.2d 814, 818 (9th Cir. 1976) (where appellant filed a timely notice of appeal but failed to prosecute the appeal in a diligent manner, refusing to dismiss for failure to prosecute and stating: "While appellant has not proceeded diligently, the Secretary has not shown any prejudice stemming from the delay. . . . Not every appeal which fails to comply with the time requirements breached by appellant herein must be dismissed.").

III. DISCUSSION

A. To Avoid Injustice And To Permit Adjudication Of Petitioner's Asylum Claim On The Merits, The Court Should Reinstate The Petition For Review.

In adjudicating Petitioner's asylum claim, the Court should have before it all of the relevant evidence and should not reach a decision based on an incomplete record. The new evidence that Petitioner seeks to admit is not inconsequential and, in fact, is quite powerful: Two of Petitioners brothers were murdered in a brutal and execution-like manner, and shortly thereafter, Petitioner's family was targeted by having gunshots fired at its home and by receiving a note stating that the family would be exterminated if it did not flee. The family fled, and its home continues to be assaulted by gunfire. Those facts bolster Petitioner's testimony—testimony that the immigration judge found credible—that he had been targeted by the guerrillas for his and his family's affiliation with the military and that he would be targeted and killed if he returned to Guatemala.

Given the nature of the new evidence, the technical nature of Petitioner's default (failure to pay a filing fee after filing a timely petition for review), and the error of Petitioner's former counsel, the Court should exercise its discretion to reinstate the petition. In *Williams v. Boeing Co.*, 681 F.2d 615 (9th Cir. 1982), the district court granted summary judgment in favor of one defendant and entered partial judgment pursuant to Federal Rule of Civil Procedure 54(b). The plaintiff's counsel filed a timely notice of appeal and then successfully moved to dismiss the appeal on the mistaken belief that the district court had not entered an appealable judgment. *See id.* at 616. Upon

realizing his error, counsel moved to reinstate the appeal. This Court permitted reinstatement:

> [T]o deny reinstatement of this appeal would be to preclude the possibility of any appellate review. We do not condone the lack of understanding of appellate procedure demonstrated by appellant's counsel, but we see no reason to let counsel's failings in this case work to his client's detriment.

Id.

The rationale for the *Williams* decision is that appeals should be decided on their merits and that appellants should not be punished for defaults caused by their counsel. That same rationale applies here, and, like *Williams*, reinstatement of the petition for review is appropriate.[4]

B. In Order To Reinstate The Petition, The Court Should Recall Its Mandate.

Because the Court has issued its mandate, recall of the mandate is the appropriate procedural mechanism for reinstating the petition for review. The Court's power to recall its mandate "may be exercised for good cause and to prevent justice. . . ." *Aerojet-General Corp. v.*

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[4] As noted, Petitioner did not know of the filing fee requirement, and had he known he would have made sure that the fee was paid. *See* Exhibit F. Because Petitioner relied on his former attorney to file the fee and to prosecute the appeal generally (as any reasonable client would do and particularly one that speaks little English), because Petitioner now has new counsel that is able and willing to prosecute the appeal and to comply with applicable requirements, and because Petitioner is proffering the filing fee with this motion, extraordinary and compelling circumstances exist that allow reinstatement of the appeal. *See* Ninth Circuit General Order 2.4. That conclusion is particularly sound in light of the nature of the new evidence that will be excluded if the appeal is not reinstated—extreme violence directed at Petitioner's family that provides support to his claim that he will be targeted *and* killed if he returns to Guatemala.

American Arbitration Assoc., 478 F.2d 248, 254 (9th Cir. 1973) (citation and quotations omitted); *see Watson v. Estelle*, 886 F.2d 1093, 1093 (9th Cir. 1989) ("We recalled the mandate from our judgment . . . pursuant to our power to prevent injustice and to protect the integrity of our processes."); *Verrilli v. City of Concord*, 557 F.2d 664, 665 (9th Cir. 1977) (recalling mandate "[b]ecause of an overpowering sense of fairness and a firm belief that this is the exceptional case requiring recall of the mandate in order to prevent an injustice"); *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988).

In United States v. Mattarolo, 209 F.3d 1153 (9th Cir.), *cert. denied*, 121 S. Ct. 208 (2000), after this Court ruled against the defendant and issued its mandate, the defendant's counsel missed the deadline to file a petition for *certiorari* in the Supreme Court. To permit the defendant to file his *certiorari* petition, the Court relieved him of his attorney's procedural default by recalling the mandate, vacating the prior decision, and then reissuing the decision verbatim. *See id.* at 1155.

Other circuits have shown similar leniency in excusing parties from their attorneys' failures to perfect appeals. *In McHale v. United States*, 175 F.3d 115 (2d Cir. 1999), the defendant's counsel filed a timely notice of appeal but then failed to submit a brief and appendix prior to the court-imposed scheduling deadline. The court then dismissed the appeal for failure to prosecute, and the defendant filed a section 2255 motion to vacate his sentence on the ground of ineffective assistance of appellate counsel. The district court denied the petition, and the defendant appealed. The court of appeals held that section 2255 relief was inappropriate but that the court instead would recall its mandate and reinstate the appeal:

> In the pending case, we are concerned, not with a failure to file an appeal, but with a failure to pursue a properly filed appeal. . . . [M]ost clients will expect their appellate lawyer to take all necessary steps to perfect a filed appeal and will not normally request the lawyer to do so. . . . [W]e have jurisdiction to recall our mandate dismissing McHale's direct appeal for failure to prosecute and to reinstate that appeal. . . . [W]e have used this procedure to relieve a party of an appellate default. . . .

Id. at 119-20; *see also United States v. Winterhalder*, 724 F.2d 109 (10th Cir. 1983) (where defendant's counsel filed timely notice appeal and where appeal was dismissed for failure to prosecute, recalling mandate and reinstating appeal).

The situation here is similar to those in which this Court and other courts have recalled their mandate to reinstate appeals that have been dismissed because of technical procedural defaults resulting from the neglect of appellate counsel. As in those cases, the Court should recall its mandate so that it can prevent an injustice and adjudicate the petition on the merits.

C. The Court Should Consolidate This Petition With The Petition For Review Of The BIA's Denial Of Petitioner's Asylum Claim.

Once the Court recalls its mandate and reinstates the petition, it should consolidate the petition with Petitioner's original petition for review relating to his asylum claim. Consolidation will permit adjudication of the asylum claim in conjunction with the motion to reopen, will permit the Court to consider all relevant evidence, and will conserve judicial resources.

IV. CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Court recall its mandate, reinstate the petition for review, and consolidate the petition with the petition for review of the denial of Petitioner's asylum claim.

Dated: May 16, 2001

SCOTT D. WIENER
Scott D. Wiener

HELLER EHRMAN WHITE
& MCAULIFFE LLP
333 Bush Street
San Francisco, CA 94104

Attorneys for Petitioner
Fredy Orlando Ventura

STATEMENT OF RELATED CASE

Pursuant to Rule 28-2.6 of the Ninth Circuit Local Rules, counsel for Petitioner states that a related case—*Fredy Orlando Ventura v. Immigration and Naturalization Service,* Case No. 99-71004—is currently pending before the Court and is set for argument on June 13, 2001.

Dated: May 16, 2001

SCOTT D. WIENER
Scott D. Wiener

HELLER EHRMAN WHITE
& MCAULIFFE LLP
333 Bush Street
San Francisco, CA 94104

Attorneys for Petitioner
Fredy Orlando Ventura

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Local Rule 32-1, I certify that the above motion:

1. Is proportionately spaced using Times New Roman typeface;

2. Has a typeface of 14 points;

3. Contains 2,418 words; and

4. Does not exceed 40 pages

Dated: May 16, 2001

SCOTT D. WIENER
Scott D. Wiener

HELLER EHRMAN WHITE
& MCAULIFFE LLP
333 Bush Street
San Francisco, CA 94104

Attorneys for Petitioner
Fredy Orlando Ventura

PROOF OF SERVICE BY MAIL

I, Orapin Eskridge, declare as follows:

I am employed with the law firm of HELLER, EHRMAN, WHITE & MCAULIFFE LLP, whose address is 333 Bush Street, San Francisco, California 94104-2878. I am readily familiar with the business practices of this office for collection and processing of correspondence for mailing with the United States Postal Service; I am over the age of eighteen years and not a party to this action.

On May 16, 2001, I served the following:

MOTION TO RECALL MANDATE, TO REINSTATE PETITION FOR REVIEW, AND TO CONSOLIDATE WITH CASE NO. 99-71004

on the below parties in this action by placing true copies thereof in sealed envelopes, addressed as shown, for collection and mailing pursuant to the ordinary business practice of this office which is that correspondence for mailing is collected and deposited with the United States Postal Service on the same day in the ordinary course of business:

James A. Hunolt
Office of Immigration Litigation
Civil Division, Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, DC 20044
(202) 616-4876

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Francisco, California on May 16, 2001.

ORAPIN ESKRIDGE
Orapin Eskridge

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A72 688 860 - San Francisco

Date: February 24, 2000

In re: FREDY ORLANDO *VENTURA*

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:

Jan Austerlitz, Esquire
405 14th Street, #1600
Oakland, California 94612

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act
[8 U.S.C. § 1251(a)(1)(B)]—
Entered without inspection

APPLICATION: Reopening; remand

ORDER:

PER CURIAM. This case was previously before this Board on July 19, 1999, when we dismissed the respondent's appeal from an Immigration Judge's decision denying the respondent's applications for asylum and

withholding of deportation under sections 208(a) and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a), 1253(h). On August 26, 1999, the respondent filed a motion to reopen the proceedings asserting that new evidence previously unavailable supports the respondent's claim that he has a well-founded fear of persecution by the guerillas on account of his political opinion. The motion to reopen and remand for further proceedings is denied.

A motion to reopen will not be granted if the respondent does not establish a prima facie case of eligibility for the underlying relief sought. *See INS v. Abudu*, 485 U.S. 94 (1988); *INS v. John Ha Wang*, 450 U.S. 139 (1981). Where an alien has already had an opportunity to fully present and litigate his request for discretionary relief from deportation, a party seeking a motion to reopen proceedings for further consideration of the same form of relief bears a "heavy burden" of proving that the new evidence presented "would likely change the result in the case." *Matter of Coehlo*, 20 I&N Dec. 464, 473 (BIA 1992).

In the present case, the respondent seeks to reopen based upon evidence that his two brothers were found murdered in Guatemala 2 months after the respondent's deportation hearing concluded. The respondent further submits that his family fled their home in Guatemala due to death threats they received. The documentary evidence submitted with the motion consists of copies of the certificates for his two brothers, a copy of an army identification card belonging to the respondent's cousin, and a sworn declaration from the respondent.

We find that the respondent has not met the "heavy burden" of showing that this new evidence would likely change the result of his case. There is no evidence of who murdered his brothers and why. Nor is there any evidence of who threatened his family. The respondent

implies in his brief that the threat his father received was from the same people who killed the respondent's brothers. But there is no evidence to show a link between the murder of the respondent's brothers, the threats to his family and the fear of the guerillas held by the respondent. Attacks on family members do not necessarily establish a well-founded fear of persecution absent a pattern of persecution tied to the respondent. *See Prasad v. INS*, 47 F.3d 336, 340 (9th Cir. 1995); *Arriaga-Berrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991). We note that the record contains evidence that since the signing of the peace accords, the level of crime and violence in Guatemala is higher than in the recent past, and the "underlying motivation in most asylum cases now appears to stem from common crime and/or personal vengeance." Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *Guatemala - Profile of Asylum Claims & Country Conditions* Part Three, III (June 1997) (Exh. 6). Without more, these incidents appear to be a result of the general conditions of violence and civil unrest in Guatemala, and the respondent's resultant fear of these conditions, however compelling, does not alone substantiate a "well-founded fear of persecution" within the meaning of those terms in the Act. *See INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *Osorio v. INS*, 99 F.3d 928 (9th Cir. 1996); *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

Accordingly, we find that the respondent has failed to demonstrate that reopening is warranted as he has not set forth a *prima facie* case for eligibility for the relief sought. *See* 8 C.F.R. §§ 208.13 and 208.16(c); *INS v. Abudu, supra; Matter of Coehlo, supra.*

/s/ [INSERT NAME]
FOR THE BOARD

CERTIFICATE OF SERVICE

I, Jan Austerlitz, certify that I am over 18 years of age and that on March 21, 2000, I mailed copies of the Petition for Review in the case of Fredy Orlando Ventura (A72 688 860) to the following:

Attorney General
Office of Immigration Litigation
Dept. of Justice
Washington, D.C. 20530

District Director
INS
630 Sansome Street
San Francisco, CA 94111

Dated: March 21, 2000 JAN AUSTERLITZ
Jan Austerlitz